

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MARY KUEBER-MUKHTAR,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

) Case No. DISM-04-0050

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; BUSSE NUTLEY, Vice Chair; and GERALD L. MORGEN, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on January 20, 2005.

1.2 **Appearances.** Appellant did not appear. Mitchel Sachs, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, insubordination and gross misconduct. Respondent alleges Appellant refused a directive to report to work after her physician indicated she had no work restrictions.

II. FINDINGS OF FACT

2.1 Appellant Mary Kueber-Mukhtar was a permanent employee for Respondent Department of Transportation. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on April 28, 2004.

2.2 Appellant began her employment with the Department of Transportation in January 2001. In December 2002, Appellant began to suffer from lower back pain. Beginning March 20, 2003, Appellant went on family medical leave. Appellant's family medical leave expired on June 16, 2003, and the department began efforts to return Appellant to the workplace.

2.3 The department contracted with a vocational specialist to conduct a job analysis report to determine Appellant's ability to perform her duties as a Transportation Planner. In August 2003, Dr. Edward Yee concluded Appellant could resume her duties for four hours per day, five days per week and that she could progress to her full-time regular duties in eight weeks. Dr. Yee also made recommendations to accommodate Appellant's physical condition. Dr. Douglas Pepper reviewed Dr. Yee's return to work recommendations and findings and signed his concurrence with the modified work plan.

2.4 On October 2, 2003, Amir A. Rasaie, Assistant Regional Administrator for Programs and Services, wrote Appellant offering her "regular, ongoing employment" that would accommodate her physical capabilities based on Dr. Yee and Dr. Pepper's release. Mr. Rasaie directed Appellant to return to work on October 13, 2003. Appellant telephoned the agency to indicate she was still in pain and would not return to work. The department subsequently scheduled Appellant to undergo

1 an independent medical examination (IME); however, Appellant did not attend the IME. Instead,
2 she attended a Department of Labor and Industries (L&I) IME on December 18, 2003.

3
4 2.5 On December 22, 2003, Kittie Tyler, Human Resource Consultant, wrote Appellant
5 requesting she provide the department with medical clarification of her limitation related to her job
6 duties. The stated purpose for gathering the information was to determine if the department needed
7 to provide additional reasonable accommodation to enable Appellant to return to work.

8
9 2.6 In February 2004, the department received the results of the IME from L&I, which indicated
10 in part, that there was “no reason to restrict [Appellant’s] activities as far as her sedentary work is
11 concerned.”

12
13 2.7 On February 26, 2004, Mr. Rasaie wrote to Appellant indicating that she had been cleared to
14 return to work, with accommodations. He instructed Appellant to report to work on March 4, 2004,
15 at 8 a.m.

16
17 2.8 In a letter dated March 1, 2004, Appellant informed Mr. Rasaie that she was not able to
18 physically commute to her workstation. Appellant did not report to work on March 4, 2004. Mr.
19 Rasaie subsequently wrote Appellant and informed her he was contemplating taking formal action
20 to dismiss her for her failure to return to work as directed. Mr. Rasaie indicated he was providing
21 Appellant with an opportunity to respond and provide any documentation to support her continued
22 absence from work. Appellant again responded she was unable to physically commute to the
23 workplace.

24
25 2.9 Mr. Rasaie was Appellant’s appointing authority when the discipline was imposed. Mr.
26 Rasaie concluded Appellant provided nothing to justify her continued absence from work and that

1 she neglected her duty and was insubordinate when she disobeyed his directives that she return to
2 work. Mr. Rasaie testified that Appellant was absent from her position for over a year, and that
3 during that absence, her work was distributed to other employees, which negatively impacted their
4 workload, productivity and morale. Mr. Rasaie concluded that Appellant's refusal to return to work
5 interfered with the department's ability to meet its mission and rose to the level of gross misconduct.
6 In determining the level of discipline, Mr. Rasaie considered Appellant's length of service and her
7 employment record. However, because Appellant failed to provide him with any medical
8 documentation to support her refusal to return to work, he concluded that termination was the
9 appropriate sanction.

11 III. CONCLUSIONS OF LAW

12 3.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

13
14 3.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
15 the charges upon which the action was initiated by proving by a preponderance of the credible
16 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
17 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
18 Corrections, PAB No. D82-084 (1983).

19
20 3.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
21 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
22 of Social & Health Services, PAB No. D86-119 (1987).

23
24 3.4 Insubordination is the refusal to comply with a lawful order or directive given by a superior
25 and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v.
26 Dep't of Social & Health Services, PAB No. D94-025 (1995).

1
2 3.5 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
3 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant
4 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's
5 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

6
7 3.6 Respondent has met its burden of proving by a preponderance of the credible evidence that
8 Appellant's refusal to return to work constituted a neglect of her duty, insubordination and rose to
9 the level of gross misconduct. Under the facts and circumstances, termination is appropriate, and
10 the appeal of Mary Kueber-Mukhtar should be denied.

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12 **IV. ORDER**

13 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Mary Kueber-Mukhtar is
14 denied.

15
16 DATED this _____ day of _____, 2005.

17
18 WASHINGTON STATE PERSONNEL APPEALS BOARD

19
20 _____
21 Walter T. Hubbard, Chair

22
23 _____
24 Busse Nutley, Vice Chair

25
26 _____
Gerald L. Morgen, Member